

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

NATHANIEL LOVE

PETITIONER

VS.

NO. 2:94CV177-D-B

EDWARD M. HARGETT, et al.

RESPONDENTS

**FINAL ORDER AND JUDGMENT ADOPTING IN PART THE
MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Upon consideration of the file and record in this action, the court is of the opinion that the Magistrate Judge's Report and Recommendation dated July 12, 1996, should be approved and adopted. Having conducted an independent, de novo review of the record, including the petitioner's objections and applicable case law, the court is of the opinion that the Magistrate Judge's recommendations should only be adopted in part. The Magistrate Judge recommended dismissal of the petitioner's claims for post-conviction relief after finding that they are procedurally barred from federal review pursuant to Coleman v. Thompson, 501 U.S. 722, 750, 115 L.Ed.2d 640, 669, 111 S. Ct. 2546 (1991). Coleman provides

In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman, 501 U.S. at 750, 115 L.Ed.2d at 669.

In his Objections to the Magistrate Judge's Report and Recommendation, the petitioner agrees that Coleman precludes review of several of his grounds for relief. The petitioner originally sought relief on the following grounds:

1. Denial of fair trial in violation of the 5th, 6th, and 14th amendments due to cumulative error.
2. Ineffective assistance of counsel at trial and on direct appeal.
3. Denial of Due Process and Equal Protection in that petitioner's sentence was obtained through the admission of illegally obtained evidence.
4. Denial of Due Process in that petitioner was placed in a lineup without counsel present.

5. Denial of Due Process in that the trial court denied petitioner a continuance.
6. Denial of Due Process in that jury selection was improper and an admonition should have been given to the jury.
7. Denial of Due Process in that the trial court should not have denied petitioner's request to have an expert testify as to what the actual words were on the recorded statements, and various other evidentiary rulings were incorrect.

The petitioner contests the dismissal of three claims: ineffective assistance of counsel, the admission of illegally obtained evidence (namely, his allegedly coerced confession), and denial of the right to a fair and impartial jury. In his report and recommendation, the Magistrate Judge noted that

[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment.

Coleman, 501 U.S. at 729. The Mississippi Supreme Court addressed each of the petitioner's claims in the state post-conviction collateral relief proceeding and determined that sections 99-39-21 and 99-39-27 of the Mississippi Code mandated denial of the petitioner's application. The relevant portion of section 99-39-21 provides:

(1) Failure by a prisoner to raise objections, defenses, claims, questions, issues or errors either in fact or law which were capable of determination at trial and/or on direct appeal, regardless of whether such are based on the laws and the Constitution of the state of Mississippi or of the United States, shall constitute a waiver thereof and shall be procedurally barred, but the court may upon a showing of cause and actual prejudice grant relief from the waiver.

(3) The doctrine of res judicata shall apply to all issues, both factual and legal, decided at trial and on direct appeal.

Miss. Code Ann. § 99-39-21(1), (3).

The relevant portion of section 99-39-27 provides:

(5) Unless it appears from the face of the application, motion, exhibits and the prior record that the claims presented by such are not procedurally barred under Section 99-39-21 *and that they further present a substantial showing of the denial of a state or federal right*, the court shall by appropriate order deny the application.

Miss. Code Ann. § 99-39-27. The Magistrate Judge therefore recommended that "the petition be dismissed without evidentiary hearing as procedurally barred."

After a thorough review of the state record, it appears that the petitioner did indeed address on direct appeal the issues of his allegedly coerced confession and the denial of a fair and impartial

jury.¹ State Record, Appellant Brief at 43-45 (89-KA-1063) (on appeal from Circuit Court of Bolivar County). As such, those claims are not procedurally barred under Miss. Code Ann. 99-39-21(1) and neither the res judicata subsection (99-39-21(3)) nor section 99-39-27(5) preclude federal review as an adequate and independent state ground. Those claims shall be remanded to the Magistrate Judge for further proceedings.

The petitioner's Sixth Amendment claim for ineffective assistance of counsel at trial and on appeal was not raised on direct appeal. However, that failure shall not procedurally bar the claim because the petitioner had the same counsel at trial and on direct appeal. Sones v. Hargett, 61 F.3d 410, 416 n.9 (5th Cir. 1995) ("We recognize that a habeas petitioner typically is not required to present a claim of ineffective assistance of counsel on direct appeal in Mississippi, at least when the same counsel represented him both at trial and on appeal.") (citing Wiley v. State, 517 So. 2d 1373, 1378 (Miss. 1987), cert. denied, 486 U.S. 1036, 108 S. Ct. 2024, 100 L.Ed.2d 610 (1988)); Wheat v. Thigpen, 793 F.2d 621, 625 n.3 (5th Cir. 1986) ("Mississippi reviews claims of ineffective assistance of counsel differently than other claims . . . and allows a petitioner to raise such claims in a post-conviction proceeding."); United States v. Jett, 848 F. Supp. 1292, 1296 (S.D. Miss. 1994) (noting that since none of petitioner's claims were raised on direct appeal, all were procedurally barred except claim for ineffective assistance of counsel); Read v. State, 430 So. 2d 832, 837-42 (Miss. 1983). As such, the ineffective assistance claim shall also be remanded to the Magistrate Judge for further appropriate proceedings.

Therefore it is ORDERED that:

- 1) the report and recommendation of the Magistrate Judge dated July 12, 1996, be approved and adopted as the opinion of the court except as modified by this order.
- 2) the petitioner's claims shall be DISMISSED except as to his claim for ineffective assistance of counsel, his coerced confession claim and his claim of the denial of his right to a fair and impartial jury.

¹The substance of the petitioner's jury claim is that the trial court improperly refused to strike for cause juror Sherry Jones. Ms. Jones had served as the official court reporter during the petitioner's preliminary hearing.

3) the petitioner's claim for ineffective assistance of counsel, his coerced confession claim and his claim of the denial of his right to a fair and impartial jury are hereby REMANDED to the Magistrate Judge for further proceedings consistent with this order.

SO ORDERED this ____ day of September 1996.

United States District Judge